Supreme Court, U.S.
FILED
OCT 12 1999
OFFICE OF THE CLERK

No. 99-441

In The

Supreme Court of the United States

LEON KIRKPATRICK, et al.,

Petitioners,

v.

CITY OF BANGOR,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Judicial Court Of The State Of Maine

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOHN K. HAMER
Counsel of Record
NORMAN S. HEITMANN, III
City of Bangor
73 Harlow Street
Bangor, Maine 04401
(207) 945-4400

Attorneys for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED FOR REVIEW

I. Does 17 M.R.S.A. § 2851 violate the Due Process Clause by authorizing a municipality to order the demolition of a structure upon a finding, made during a public hearing, that the building constitutes a dangerous building and a nuisance where the property owner has been given notice of the hearing and has been afforded the opportunity to be heard?

II. Does 17 M.R.S.A. § 2851 violate the Due Process Clause by authorizing a municipality to order the demolition of a building that has been found to be dangerous and a nuisance as a matter of fact without first giving the owner an opportunity to repair where the owner has not presented any specific rehabilitation plan or expressed any intention to completely rehabilitate the building in the near future?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

REASONS FOR DENIAL OF THE WRIT 6

I. CERTIORARI SHOULD BE DENIED BECAUSE THERE IS NO CONFLICT BETWEEN THE RULING OF THE MAINE SUPREME JUDICIAL COURT IN THIS CASE AND THE RULINGS OF OTHER STATE HIGH COURTS AND FEDERAL CIRCUIT COURTS REGARDING WHAT NOTICE AND OPPORTUNITY TO BE HEARD IS REQUIRED BY DUE PROCESS BEFORE A MUNICIPALITY, ACTING UNDER STATE LAW, MAY ORDER THE DEMOLITION OF A BUILDING THAT IS DANGEROUS AND A NUISANCE IN FACT 7

II. CERTIORARI SHOULD BE DENIED BECAUSE THE DECISION OF THE MAINE SUPREME JUDICIAL COURT DOES NOT REPRESENT A DEPARTURE FROM THE EXISTING DUE PROCESS DOCTRINE 11

CONCLUSION 19

TABLE OF AUTHORITIES

Page

CASES

Blanchard v. City of Ralston, 251 Neb. 706, 559 N.W.2d 735 (1997) 13, 14, 15

Freeman v. City of Dallas, 1999 WL 631750 (5th Cir. Aug. 18, 1999) 17

Hancock v. City Council of Davenport, 392 N.W.2d 472 (Iowa 1986) 7, 8, 9, 10

Hawthorne Savings and Loan Association v. City of Signal Hill, 19 Cal.App.4th 148, 23 Cal.Rptr.2d (1993) 13, 14, 15

Horton v. Gulledge, 277 N.C. 353, 177 S.E.2d 885 (1970), *overruled on other grounds, State v. Jones*, 305 N.C. 520, 290 S.E.2d 675 (1982) 15, 16

Johnson v. City of Paducah, 512 S.W.2d 514 (Ky. App. 1974) 15, 16

Kirkpatrick v. City of Bangor, 1999 ME 73, 728 A.2d 1268 (Me. 1999) ..... *passim*

Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) 12, 13

Miles v. District of Columbia, 510 F.2d 188 (D.C. Cir. 1975) 8, 9, 10

Murray v. City of Wilkes-Barre, 38 Pa.Comwlth. 509, 394 A.2d 1055 (1978) 18

Samuels v. Meriwether, 94 F.3d 1163 (8th Cir. 1996) 18

STATUTES

17 M.R.S.A. § 2851 ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

7A McQuillin Mun. Corp. § 24.561 (3rd Ed. 1989 & Supp. 1999) 11

Note, *Enforcement of Housing Codes*, 78 Harv. L. Rev. 801 (1965) 11

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, the City of Bangor, respectfully requests that the Court deny the Petition for Writ of Certiorari seeking review of the decision and judgment of the Maine Supreme Judicial Court, sitting as the Law Court ("Law Court"), issued on May 13, 1999, reproduced in the Appendix to the Petition for Writ of Certiorari ("Pet. App.") at 1a-12a, reported in *Kirkpatrick v. City of Bangor*, 1999 ME 73, 728 A.2d 1268 (Me. 1999).

STATEMENT OF THE CASE

A building has existed on the corner of Highland Avenue and Charles Street in the City of Bangor, Maine since 1880. Petitioners, Leon and Gertrude Kirkpatrick, purchased this building, known as 30 Highland Avenue, in the mid-1950s. The building was occupied until 1983, when it was placarded as unsafe for human habitation, and has remained vacant ever since. Pet. App. at 2a.

From 1988 until 1996, the Bangor Code Enforcement Office received thirty-nine complaints about the property, many of which concerned the building being unsecured, others which concerned children and vagrants being found in the building. Pet. App. at 3a, 34a, 71a-73a. Additionally, items of value left in the building, including electrical fixtures and copper wiring, have been stolen from the building. Pet. App. at 34a, 40a.

In March 1996, the City of Bangor, through its Code Enforcement Office, contacted the Kirkpatricks to request

an inspection of 30 Highland Avenue. The Code Enforcement Office informed the Kirkpatricks that the purpose of this inspection was to determine whether the property should be considered for condemnation by the Council as a dangerous building. Pet. App. at 2a, 29a.

The City's Building/Housing Inspector inspected both the interior and exterior of the structure with Mr. Kirkpatrick in early May 1996. On August 29, 1996, the Kirkpatricks were notified that the City Council would hold a hearing on September 25, 1996, to determine whether the building should be condemned in accordance with 17 M.R.S.A. § 2851. The hearing was postponed until October 28, 1996. The Kirkpatricks attended the October 28 hearing, represented by counsel. Pet. App. at 2a.

At the hearing, the City's Code Enforcement Officer summarized the Code Enforcement Office's history with the property. He testified that the building had been placarded as unsafe for human habitation in 1983 and remained vacant through the date of the hearing. He testified that there was no heat in the structure because the heating plants had frozen and burst, there was no electricity service, and he described the general condition of the structure as deteriorated. The Code Enforcement Officer also explained that the property had lost its nonconforming use status for five dwelling units and could only be reused as a one- or two-unit residence. Pet. App. at 28a-30a.

The City's Building/Housing Inspector testified about the condition of the property on the basis of his inspection in May 1996, conducted with Mr. Kirkpatrick.

The Inspector stated that he found foundation problems, structural problems, rotted decks, broken and missing windows, two chimneys in need of repair, rotted fascia and soffit trim, and rotted window trim and wood siding on the exterior of the building. He also noted that there were missing and rotted steps, and broken glass and other debris in the yard. On the interior of the building, he described an unsafe staircase, and stated that the interior required new electrical work, new bathroom fixtures, and new surfaces. Pet. App. at 31a-32a.

The City Engineer testified concerning the structural integrity of the structure. He stated that there appeared to be significant structural cracks in the masonry wall, with some signs of repair, and there were signs of recent movement of a corner post and possibly the steel supports. He also observed distortion of the roof planes and movement in the rear portion of the building. He did not, however, conduct an interior inspection. Pet. App. at 67a-68a.

In addition to the testimony, the record was supplemented with a packet compiled by the Code Enforcement Officer containing various documents from the Code Enforcement Office's property file for 30 Highland Avenue, all of which were public record, including the thirty-nine complaints concerning the property from 1988 to 1996. Pet. App. at 28a.

Several citizens spoke at the hearing of their own accord, one against and two in favor of the condemnation. The City Solicitor cautioned the Council, however, that the desires of the public were irrelevant to the issue of whether the structure constituted a nuisance and their

considerations must be based solely on the criteria set forth in the statute. Pet. App. at 57a-66a.

The Kirkpatricks' counsel argued that the building was not dangerous or a nuisance and submitted documents for inclusion in the record. He challenged the findings of the Code Enforcement Officer, Housing/ Building Inspector, and City Engineer, without presenting witnesses, expert or otherwise. Pet. App. at 50a. He admitted that the structure had been the subject of repeated vandalism and had various items stolen from it, such as its copper and electrical fixtures. Pet. App. at 34a, 40a.

While the Kirkpatricks expressed a vague intent to rehabilitate the property, they did not present any specific plans or time-lines for rehabilitation. In fact, their counsel stated that he did not know when the Kirkpatricks would be able to completely rehabilitate the building. Pet. App. at 50a. The Kirkpatricks chose not to personally testify at the hearing.

The City Council voted to condemn the structure as a dangerous building and nuisance pursuant to 17 M.R.S.A. § 2851. Pet. App. at 68a-70a, 19a-21a. The Council decided that the appropriate way to dispose of the structure and abate the nuisance was to order its demolition within thirty days, as the Kirkpatricks failed to present any reasonable plan for rehabilitation or other alternative. Pet. App. at 10a.

The Kirkpatricks appealed the Council's decision to the Penobscot Superior Court, alleging that 1) there was insufficient evidence in the record to support the City

Council's finding; 2) the City Council relied upon aesthetic and non-public safety concerns in condemning the property; and 3) the property owner is entitled to a specific list of the conditions which render a structure a nuisance and reasonable opportunity to repair as a matter of constitutional law. Pet. App. at 14a.

The Superior Court granted an evidentiary hearing limited to the issue of taking without just compensation. The Superior Court held that there was sufficient evidence on the record for the City Council to find that the building constituted a dangerous building and a nuisance and that the City Council did not rely on improper considerations. The court also held that the City Council was constitutionally required, when prescribing what disposal must be made of a structure adjudged to be dangerous and a nuisance under 17 M.R.S.A. § 2851, to advise property owners of the specific defects which render a structure dangerous and a nuisance and give them a reasonable time to repair the defects prior to ordering the demolition of the structure. Pet. App. at 13a-18a.

The City of Bangor appealed to the Supreme Judicial Court of Maine the portion of the Superior Court's Order on Appeal which prohibited the City from ordering demolition without first providing the Kirkpatricks with a specific list of defects which render the structure dangerous and a nuisance and giving them an opportunity to repair those defects.

The Supreme Judicial Court held the Superior Court erred by requiring the City to act beyond the scope of the statute. *Kirkpatrick v. City of Bangor*, 728 A.2d 1270 (Me. 1999), Pet. App. at 1a-12a. The court stated that a City has

a substantial interest in eliminating a building that is dangerous and a nuisance is justified in ordering demolition when a property owner has "received multiple notices of problems with the building, and [the property owner] present[s] no plan and expresses no intention to repair the building at the hearing convened for the very purpose of determining whether the building should be condemned." *Id.* at 1273, Pet. App. at 11a. Essentially, the court held that there was no violation of due process under the Maine Constitution or the Fifth and Fourteenth Amendments of the United States Constitution because the property owners had been given two month's notice of the hearing and, after making the determination that the building constituted a dangerous building and a nuisance, provided them with "an appropriate forum to present a plan for rehabilitation or other alternatives to demolition." *Id.* at 1272, Pet. App. at 9a-10a.

REASONS FOR DENIAL OF THE WRIT

The Maine Supreme Judicial Court's decision in *Kirkpatrick v. City of Bangor* that there was no due process violation when the Bangor City Council ordered the demolition of a building that was found to be dangerous and a nuisance as a matter of fact after giving the property owner notice and opportunity to be heard does not conflict with the rulings of other states and federal circuit courts. Likewise, the decision does not represent a departure from the existing due process doctrine in light of the facts and circumstances of this case. The outcome of *Kirkpatrick* was determined by the facts of the case rather than a misapplicaton of due process.

I. CERTIORARI SHOULD BE DENIED BECAUSE THERE IS NO CONFLICT BETWEEN THE RULING OF THE MAINE SUPREME JUDICIAL COURT IN THIS CASE AND THE RULINGS OF OTHER STATE HIGH COURTS AND FEDERAL CIRCUIT COURTS REGARDING WHAT NOTICE AND OPPORTUNITY TO BE HEARD IS REQUIRED BY DUE PROCESS BEFORE A MUNICIPALITY, ACTING UNDER STATE LAW, MAY ORDER THE DEMOLITION OF A BUILDING THAT IS DANGEROUS AND A NUISANCE IN FACT.

The Maine Supreme Judicial Court's decision in *Kirkpatrick* does not conflict with the rulings of other states and federal circuit courts when it upheld the Bangor City Council's order to demolish a building that was determined to be dangerous and a nuisance in fact after giving the property owner notice and opportunity to be heard at the hearing.

Neither of the two cases on which the Petitioner relies held that due process under the Fifth and Fourteenth Amendments requires a municipality to provide a specific list of defects and afford time to repair prior to ordering demolition.

In *Hancock v. City Council of Davenport*, 392 N.W.2d 472 (Iowa 1986), the court held that the City's demolition order was invalid because it failed to comply with the notice provisions contained in its own ordinances. The court held that since the ordinances required the City to notify a property owner of the findings of the building inspectors that might lead to demolition, and such information was not provided, the notice was invalid. *Id.* at 477.

The court did not, however, hold that due process required such information to be contained in the notice; rather, the City's failure to comply with its own notice procedures violated due process. In fact, the court in *Hancock* specifically noted that razing a nuisance building is within a City's authority, although action short of demolition may be appropriate if it can effectively abate the nuisance. *Id.* at 475.

In *Miles v. District of Columbia*, 510 F.2d 188 (D.C. Cir. 1975), the District of Columbia Board for the Condemnation of Insanitary Buildings condemned a building as insanitary in November 1963 and ordered its demolition by March 1964. The property owner then began restoring the property, with the Board's permission. Six years later, after the property owner had invested substantial money in the property, the condemnation notice had been removed from the building, and the property owner had been told that the building was "beyond demolition," the Board decided in an *ex parte* meeting to demolish the building. When the Board was unable to personally notify the property owner, it decided to provide notice through publication. *Id.* at 190-91. The court determined that the property owner was entitled to notice and an opportunity to be heard before the building was demolished and that the attempted notice through publication was not reasonably calculated to give actual notice. *Id.* at 193.

As in *Hancock*, the *Miles* court specifically recognized that "a municipality in the exercise of its police power may, without compensation, destroy a building or structure that is a menace to the public safety or health." *Id.* at 192. The court also stated that a municipality must give

sufficient notice, opportunity to be heard, and opportunity to demolish the building or make it safe before the municipality steps in to demolish it. *Id.*

There are several reasons why the City of Bangor's actions, taken pursuant to 17 M.R.S.A. § 2851, complied with due process. First, the defect in both *Hancock* and *Miles* was the municipalities' failure to give adequate notice before the municipalities took action. In *Hancock*, the municipality failed to follow its own notification procedures and in *Miles*, inadequate notice was provided before demolition was commenced. In *Kirkpatrick*, however, there was no such defect in notification. The City complied with all statutory notification procedures and the Kirkpatricks were personally notified of the hearing two months before the hearing took place. Moreover, the Kirkpatricks, through counsel, participated in the hearing.

Second, the standards under which the Council evaluated the building were clearly set forth in 17 M.R.S.A. § 2851. The notices sent to the Kirkpatricks specifically cited the statute. Therefore, the Kirkpatricks knew, or reasonably could have discovered, the standards the Council would use to evaluate whether the building should be condemned. Additionally, the Kirkpatricks were aware of the building's problems: the Kirkpatricks received the thirty-nine violation notices from the Code Enforcement Office; Mr. Kirkpatrick accompanied the City Inspector in May 1996 when he inspected the building; and the Kirkpatricks attended the hearing before the City Council and learned of the Council's additional concerns. The Kirkpatricks had the opportunity at the hearing to directly address those concerns.

Third, the City made a factual determination on the basis of the evidence presented at the hearing, that the only effective way to abate the nuisance was to demolish the building. The lack of a definite rehabilitation plan, fire hazards, structural problems, and the recurrent break-ins, led the Council, and subsequently the Maine Supreme Judicial Court, to the conclusion that the Kirkpatricks had no intention of making the property safe and the only effective way to abate the nuisance was demolition. The Kirkpatricks were then given a reasonable time, thirty days, to demolish the building without City intervention.

The mere fact that the Kirkpatricks disagreed with the Council's findings does not lead to the conclusion that the Kirkpatricks' due process rights were denied. It is a property owner's duty, not a municipality's, to formulate a rehabilitation plan to address a City Council's concerns. Furthermore, it is not a violation of due process for a municipality to bring a condemnation action against a property under 17 M.R.S.A. § 2851, and evaluate a building under the standards contained therein, while not issuing citations for those conditions under its municipal ordinances. Conditions that may render a building dangerous and a nuisance under the statute may not constitute code violations or may be legally non-conforming.

Since the Kirkpatricks were given proper notice and the opportunity to be heard and the Council determined that the only way to abate the nuisance was to demolish the building, *Kirkpatrick* is in harmony with *Hancock* and *Miles*.

Moreover, none of the secondary authorities the Petitioners cite conflicts with the Maine Supreme Court's holding in *Kirkpatrick v. City of Bangor*. McQuillin on Municipal Corporations explicitly recognizes that municipalities have the authority under their police powers to order the demolition of dangerous buildings without compensation, subject to public necessity. 7A McQuillin Mun. Corp. § 24.561 (3rd Ed. 1989 & Supp. 1999). Where the only way to abate the dangerous condition is to demolish the structure, an order of demolition would be appropriate.

Similarly, even the 1965 Harvard Law Review Note cited by the Petitioners recognized that municipalities have the authority to order the demolition of dangerous buildings, provided there are no alternative remedies, and the property owner is given notice and opportunity to be heard. Note, *Enforcement of Housing Codes*, 78 Harv. L. Rev. 801, 832 (1965).

Certiorari should therefore be denied because there is no conflict in the interpretation of the law or change in the prevailing view of due process.

II. CERTIORARI SHOULD BE DENIED BECAUSE THE DECISION OF THE MAINE SUPREME JUDICIAL COURT DOES NOT REPRESENT A DEPARTURE FROM THE EXISTING DUE PROCESS DOCTRINE.

The Maine Supreme Judicial Court's decision in *Kirkpatrick v. City of Bangor* does not represent a departure from the existing due process doctrine. The Maine Supreme Judicial Court ruled that 17 M.R.S.A. § 2851

provides the necessary due process protections and that the City of Bangor complied with those procedures and applied the statute so as to afford due process to the Kirkpatricks when it ordered the demolition of the building at 30 Highland Avenue.

This Court has set the test for determining whether there is a deprivation of procedural due process, stating,

> the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews v. Eldridge, 424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976).

The Maine Supreme Judicial Court used this very framework in analyzing *Kirkpatrick* and determined, on the basis of the facts and circumstances of the case, that the City complied with the requirements of procedural due process. *See Kirkpatrick*, 728 A.2d at 1272-73, Pet. App. at 8a-11a.

First, the court considered the private interest involved, a property right, in the form of a building assessed for taxes in 1997 at $25,600. *Id.* Second, the court considered the risk of erroneous deprivation through the procedures used and the value of additional safeguards.

It concluded that the procedural requirements of the statute were followed, resulting in actual notice and participation in the hearing, it was reasonable for the City to order demolition without further procedural requirements based on the facts that the building remained vacant for fifteen years, the Kirkpatricks still did not have a rehabilitation plan, and the building was dangerous and a nuisance. *Id.* Finally, the court considered the City's substantial interest in abating nuisances and removing dangerous buildings. *Id.*

On the basis of the facts of the case and the *Mathews* balancing test, the court concluded that the City Council complied with due process when it condemned the building pursuant to 17 M.R.S.A. § 2851 and ordered its demolition.

None of the cases the Petitioners cite for the proposition that due process under the Fifth and Fourteenth Amendments requires municipalities to cite specific defects that must be repaired in order to abate the dangerous and nuisance character of a building and give the property owner additional time to repair those defects actually have such a holding. In fact, upon inspection, none of the cases conflict with the Maine Supreme Judicial Court's holding in *Kirkpatrick*.

The Petitioners cite *Blanchard v. City of Ralston*, 559 N.W.2d 735 (Neb. 1997), and *Hawthorne Savings & Loan Ass'n v. City of Signal Hill*, 23 Cal.Rptr.2d 272 (Cal.App. 2 Dist. 1993), for the proposition that meaningful notification requires notification of specific defects and the opportunity to repair; however, neither case stands for such a proposition.

In *Blanchard*, a municipality demolished a building under the emergency provision of their municipal code, rather than through a condemnation proceeding. The code explicitly gave property owners the right to repair dangerous buildings within a reasonable time after notice of the danger. The municipality, however, violated a property owner's due process rights by demolishing a building without providing the notice and opportunity to repair, as required by their own ordinance. *Blanchard*, 559 N.W.2d at 739.

The court held that the municipality's actions were unconstitutional because it failed to afford the property owner rights created by the municipal code, not because due process requires notification of what defects render a building dangerous and a nuisance and time to correct those defects.

Next, in *Hawthorne*, a court of appeals held that a municipality violated a California statute, and due process generally, by failing to comply with state law when it ordered demolition of a dangerous building within 120 days. The California statute provided that property owners "shall have the choice of repairing or demolishing a dangerous building," subject to certain limits, before a City may order demolition. *Hawthorne*, 23 Cal.Rptr.2d at 278.

The *Hawthorne* court, like the *Blanchard* court, invalidated the City's demolition order because the City failed to follow the written procedures, this time set forth in state law. While the court generally discussed due process, it never referred to the Due Process Clause of the United States Constitution.

Unlike the property owners in *Blanchard* and *Hawthorne*, the Kirkpatricks received notice of the hearing in a timely manner, two months prior to the hearing, and exercised their opportunity to be heard. Unlike the municipalities in *Blanchard* and *Hawthorne*, the City of Bangor complied with all statutory notice requirements of 17 M.R.S.A. § 2851 and therefore did not violate due process by failing to adhere to written procedures.

The Petitioners then cite *Johnson v. City of Paducah*, 512 S.W.2d 514 (Ky. App. 1974), and *Horton v. Gulledge*, 277 N.C. 353, 177 S.E.2d 885 (1970), *overruled on other grounds, State v. Jones*, 305 N.C. 520, 290 S.E.2d 675 (1982), for the proposition that a property owner should be afforded a reasonable time to repair a building to comply with a building code, if he desires. These decisions, however, were made on the basis of state constitutions and ordinances that provided for automatic demolition based on projected cost of repair. Neither court considered due process under the United States Constitution or a statute which permits a quasi-judicial body to tailor a remedy.

In *Johnson*, a property owner challenged a provision of a housing code that permitted the municipality to give a property owner the option of repairing a building where the cost of repair was 50 percent or less of the property's present value but required demolition if the cost exceeded 50 percent. Although the court recognized that a municipality has the power to order a dangerous building to be demolished under its police power, the mandatory order of demolition when the cost of demolition exceeds 50 percent of its value was held unconstitutional under the Constitution of Kentucky. Under the circumstances, the Kentucky Constitution required the

municipality to give the property owner time to repair the building to comply with the building code. *Johnson*, 512 S.W.2d at 516.

Similarly, in *Horton*, the Supreme Court of North Carolina held that the Law of the Land Clause of the North Carolina Constitution, not the Due Process Clause of the United States Constitution, prohibited a municipality from ordering the demolition of a building under its building code without providing the owner the opportunity to repair. *Horton*, 177 S.E.2d at 889-90. The municipal code in *Horton* also required the demolition of an unsafe building where the cost of bringing the building into compliance with the building code would exceed a certain percent, in this case 60 percent, of the value of the building in its present condition. *Id.* at 887.

In contrast to the codes in *Johnson* and *Horton*, 17 M.R.S.A. § 2851 does not require automatic demolition based on the projected cost of rehabilitation; rather, it permits municipalities to hold a quasi-adjudicative hearing to first determine whether a building is dangerous and a nuisance, and second determine how to effectively abate the nuisance, including the possibility of repair, if the circumstances warrant, or demolition. Neither the *Johnson* nor *Horton* courts considered whether a municipality could order demolition where a building was found to constitute a dangerous building and a nuisance as a matter of fact and where the municipality determines that the only effective method of abatement was demolition under the Due Process Clause of the United States Constitution.

The Petitioners next cite *Freeman v. City of Dallas*, No. 97-10907, 1999 WL 631750 (5th Cir. Aug. 18, 1999), for the proposition that prior notice of specific code violations is necessary in order to comply with due process. Rather, the case stands for the proposition that notification to permit a meaningful opportunity to be heard does not require specific notification of every defect.

The plaintiffs in *Freeman* argued that they were denied a meaningful opportunity to be heard in a condemnation proceeding resulting an order to demolish two buildings because they were not told that the Department of Housing and Neighborhood Services had briefed the government agency panel on the condition of the property, they were not provided with the Department's information on the properties, they were not given notice of tours the panel took of the property, and the Department officials who reported the code violations were not present at the hearings.

Nevertheless, the court held that the plaintiffs had sufficient notification to permit a meaningful opportunity to be heard because panel members conveyed their concerns to the plaintiffs during a site visit and at a rehearing. The court noted that the plaintiff also had the opportunity to call the Department officials who had cited the buildings for code violations and call any other people as witnesses, but did not do so.

Likewise, the Kirkpatricks had sufficient notification to permit a meaningful opportunity to be heard in *Kirkpatrick*. The Kirkpatricks were aware that the property had been burglarized and left unsecured on numerous occasions over the years because the Code

Enforcement Office repeatedly contacted them and required the building be resecured. Additionally, Mr. Kirkpatrick attended the building inspection with the City Inspector five months prior to the hearing. While the inspection did not result in the issuance of any violation notices under the Code of the City of Bangor, the Kirkpatricks had ample opportunity to contact the Code Enforcement Office to discuss the inspector's findings. Moreover, the Kirkpatricks had the opportunity to discuss and address the concerns of the City Council during the actual hearing.

Finally, neither the holdings in *Samuels v. Meriwether*, 94 F.3d 1163 (8th Cir. 1996), nor *Murray v. City of Wilkes-Barre*, 394 A.2d 1055 (1978) conflict with the holding in *Kirkpatrick*. While the courts in *Samuels* and *Murray* both upheld an order of demolition following an order to abate code violations, neither court addressed the issue of whether an opportunity to repair was constitutionally required.

Since the Maine Supreme Judicial Court's holding in *Kirkpatrick v. City of Bangor* does not conflict with the holdings of other courts and does not represent a departure from the due process doctrine, certiorari should be denied.

CONCLUSION

For the reasons stated above, the Petition for a Writ of Certiorari should be denied.

Dated: October 8, 1999

Respectfully submitted,

JOHN K. HAMER
NORMAN S. HEITMANN, III
City of Bangor
73 Harlow Street
Bangor, Maine 04401
(207) 945-4400

Attorneys for Respondent